

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CRIMINAL APPLICATION No. 1432 of 2007
WITH
CRIMINAL MISC. APPLICATION No. 7659 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the Civil Judge?

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STATE OF GUJARAT - Applicant(s)
Versus
KHENGARBHAI NAVDHANBHAI DODIA & 26 - Respondent(s)

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Appearance :
MR KT DAVE, ADDL PUBLIC PROSECUTOR for Applicant(s) : 1,
MR AD SHAH for Respondent(s) : 1, 7, 9, 23,
UNSERVED-WANT OF TIM for Respondent(s) : 2,4 - 6, 8,10 - 22,24 - 27.
WITHDRAWN for Respondent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 01/11/2007

ORAL JUDGMENT

By way of this application under Article 227

of the Constitution of India, read with Section 482 of the Criminal Procedure Code, the petitioner – State of Gujarat has prayed for an appropriate Writ, direction and/or order to quash and set aside the impugned order dated 02.06.2007 passed by the learned Additional Sessions Judge, Fast Track Court No.3, Ahmedabad (Rural) passed below Exh.170 in Sessions Case No.20 of 2005.

2. Criminal Misc. Application No.7659 of 2007 is filed by the petitioner – original complainant challenging the very impugned order below Exh.170, which is challenged in Special Criminal Application No.1432 of 2007.

3. All the respondents are accused in Sessions Case No.20 of 2005 pending in the Court of learned Presiding Officer, Fast Track Court No.3, Ahmedabad (Rural). During trial, the prosecution submitted application below Exh.163 to issue summons upon three witnesses i.e. Clerk, Bailiff, Court Commissioner – Shri M.D.Kapadia, to produce original papers / complaint etc. of Regular Civil Suit No.113 of 2004;

original documents / papers relating to service of notice for initiating proceedings by Court Commissioner; and the original papers produced by the Court Commissioner relating to the proceedings by Commission produced in Regular Civil Suit No.113 of 2004. On the said application, learned Advocate appearing on behalf of the accused Nos.1,3,4,9 and 23 submitted no objection by making endorsement on the said application that those accused persons have no objection if witnesses named in para – 5 of the said application are examined as additional witnesses. The said endorsement was made as all the witnesses named in para – 5 are not shown as witnesses in the charge-sheet, therefore, they were treated as additional witnesses. It appears from the record that the learned trial Court considering the application exh.163, endorsement/ no objection submitted by the learned Advocate appearing on behalf of the accused Nos.3,4,9 and 23, by order dated 16th March, 2007, the learned trial Court passed an order to issue summons upon those witnesses named in the said application. That thereafter, after a period of almost one month of passing of the order of issuing summons upon the

additional witnesses named in para 5 of the application below exh.163, an application came to be submitted vide exh.170 by the learned Counsel appearing on behalf of accused nos.1,3 and 9 with a prayer that the Court be pleased to call upon the prosecution to examine the witnesses pertaining to proceedings of the Court Commissioner cited in the charge-sheet and till the concerned witnesses are not over, examination of additional witnesses may not be permitted at this stage. Said application was opposed by the learned Public Prosecutor by submitting that once no objection was given by the learned Advocate appearing on behalf of accused Nos. 1,3 and 9 to examine additional witnesses named in para – 5 of the application below Exh.163 and when the learned trial Court has issued summons upon those witnesses it is not open for the said accused to submit objections and prayer which is sought in application below Exh.170. It was further submitted that there are no hard and fast rules by which first witnesses named in the charge-sheet are to be examined and only thereafter additional witnesses can be examined. It is submitted that it is ultimately for the learned Public

Prosecutor and the prosecution to decide which witnesses are to be examined first. It is also further submitted that no prejudice will be caused to the accused persons if those additional witnesses are examined prior to those witnesses named in the charge-sheet. In spite of above, learned Additional Sessions Judge, Fast Track Court No.3, Ahmedabad (Rural) by his order dated 02.06.2007 allowed the application Exh.170 by holding that request of prosecution to examine those witnesses is not justified and/or proper until all the witnesses named in the charge-sheet are examined and; that those additional witnesses are required to be examined or can be considered at the time of final stage. Being aggrieved and dissatisfied with the order passed below application – Exh.170 dated 02.06.2007 passed by the learned Additional Sessions Judge, Fast Track Court No.3, Ahmedabad (Rural), the petitioner – State of Gujarat has preferred the present Special Criminal Application for the aforesaid reliefs.

4. Mr.K.T.Dave, learned APP has submitted that the impugned order passed by the learned Additional

Sessions Judge allowing the application below Exh.170 is absolutely illegal and perverse which requires to be quashed and set aside. It is also submitted by him that the learned trial Court ought to have appreciated that once the learned Advocate appearing on behalf of the accused gave no objection for examining additional witnesses named in para 5 of the application below Exh.163, it was not open for the accused persons to submit application below Exh.170 and even considering no objection submitted by the learned Advocate appearing on behalf of the accused, the learned trial Court ought not have been allowed application below Exh.170. It is submitted by him that examination of the witnesses is prerogative of the prosecution and within the discretion of the learned Public Prosecutor to decide to whom he wants to examine first during the course of trial. It is further submitted by him that there are no straight jack formula that the witnesses shown in the charge-sheet are to be examined first during trial chronologically. It is submitted that the prosecution may examine prime and important witnesses at any point of time and hence, the order passed by the learned Additional Sessions Judge is

contrary to the settled principle of law and curtailing the powers of the prosecution. It is further submitted that as such the order dated 02.06.2007 passed by the learned Sessions Judge is nothing but a review of the earlier order dated 16.03.2007 which is contrary to the settled principles of law. It is further submitted that when the learned Public Prosecutor was of the opinion that in the facts and circumstances of the case, those persons named in application below Exh.163 are to be examined first as witnesses for the purpose of production of material and/ important documents and; that when the said application was given and it was not objected to by the accused persons, the learned trial Court has committed an error in allowing the said application below Exh.170.

It is submitted by him that infact the learned Additional Sessions Judge, has granted relief and/or order passed below Exh.170 beyond the relief sought by the accused persons in the application Exh.170. Therefore, it is requested to allow the present petition as prayed for.

5. The petition is opposed by Mr.A.D.Shah, learned Senior Advocate appearing on behalf of respondent Nos.1,7,9 and 23. It is submitted by Mr.Shah, that the impugned order passed below Exh.170 is an interlocutory order and therefore, the present petition is not maintainable. It is submitted that as such no objection was given by the accused persons in the application Exh.163 only for examining those persons named in para – 5 in application Exh.163 as additional witnesses and said no objection was not related to at what stage those additional witnesses are to be examined. It is submitted that normally those witnesses named in the charge-sheet are to be examined first and only thereafter if there is necessity to examine other witnesses not named in the charge-sheet, they can be called as additional witnesses. Mr.Shah, learned Advocate has relied upon the decision of the Hon'ble Supreme Court in the case of Mohd. Yunus v/s. Mohd. Mustaquim and ors. reported in AIR 1984 SC 38 as well as in the case of Sadhana Lodh v/s. National Insurance Co.Ltd. & Anr. reported in AIR 2003 SC 1561 in support of his submission not to interfere with the order passed by the learned

trial Court in exercise of powers under Article 227 of the Constitution of India. It is submitted by him that unless it is found that there is jurisdictional error, then and then only powers under Article 227 of the Constitution of India can be exercised. It is submitted that even error of law also cannot be corrected while exercising powers under Article 227 of the Constitution of India. It is further submitted by him that supervisory jurisdiction conferred under Article 227 of the Constitution of India is confined only to see whether inferior Court or Tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record much less error of law. It is submitted that when the learned trial Court has exercised discretion while allowing the application Exh.170, same is not required to be interfered by this Court in exercise of powers under Article 227 of the Constitution of India. Therefore, it is requested to dismiss the present application.

6. Mr.B.S.Patel, learned Advocate appearing on behalf of original complainant in Criminal Misc.Application No.7659 of 2007 has adopted the

submission made on behalf of the prosecution and has submitted that the order passed by the learned Sessions Judge below Exh.170 is illegal and contrary to law and reviewing its own order passed below Exh.163. Therefore, it is requested to quash and set aside the impugned order passed below Exh.170.

7. Heard the learned Advocates appearing on behalf of the respective parties.

8. At the outset, it is required to be noted that all those witnesses sought to be examined as additional witnesses were not named in the charge-sheet as witnesses and therefore, the prosecution submitted application under Section 311 of the Cr.P.C. vide application Exh.163 on 08.03.2007 to issue summons to the witnesses and the prosecution requested as under:

“(a) The concerned Clerk of Senior Judge (J.D.), Sanand should remain present with original papers of Regular Civil Suit No.113/2004;

(b) The concerned Bailiff who was called upon by Court Commissioner to serve notice in respect to the proceedings of Court Commissioner appointed

in Regular Civil Suit No.113/2004 pending before the Court of Senior Judge (J.D.), Sanand.

(c) Shri M.D.Kapadia, Court Commissioner should remain present with the proceedings carried out and report submitted along with necessary papers in Regular Civil Suit No.113/2004 pending before the Court of Senior Judge(J.D.), Sanand."

9. It also appears from the record that the learned Advocate appearing on behalf of accused Nos.1,3,4,9 and 23 gave their no objection by making endorsement on application Exh.163 that they have no objection if those persons named in para - 5 in application Exh.163 are examined as additional witnesses. On the basis of said no objection and considering application Exh.163, the learned Additional Sessions Judge by order dated 16.03.2007 passed an order issuing summons upon the additional witnesses named in para -5 in the application Exh.163. That after a period of one month from the order dated 16.03.2007 passed by the learned Sessions Judge issuing summons upon the additional witnesses, as a second thought accused Nos.1,3 and 9 submitted application Exh.170 by submitting that as regards prayer (a) and (b) in respect of production of

necessary documents pertaining to Court Commissioner proceedings in Regular Civil Suit No.113/2004 pending before Senior Judge (J.D.), Sanand, same can be permitted. However, consideration of prayer (c) and more particularly, examination of Shri M.D.Kapadia, may be deferred till the relevant witnesses cited in the charge-sheet are examined for consideration of prejudice likely to be caused to the defence by such additional evidence. Therefore, it was prayed that the Hon'ble Court be pleased to call upon the prosecution to examine the witnesses pertaining to this proceedings of Court Commissioner cited in the charge-sheet and till the concerned witnesses are not over, examination of the additional witness may not be permitted at this stage. Inspite of above, learned Additional Sessions Judge while passing the impugned order dated 02.06.2007 while allowing the application Exh.170 had observed and held that the prosecution can submit application for additional witnesses after witnesses named in the charge-sheet are examined and whether those additional witnesses are required to be examined or not can be considered only at final stage and at this stage same cannot be decided. Thus, by

passing impugned order and the aforesaid observations are just contrary to the order passed below Exh.163 and even beyond the prayer made in Exh.170. As stated above, application Exh.163 for issuing summons upon the additional witnesses was already allowed considering no objection submitted by the accused persons and even summons were also ordered to be issued. Therefore, as such impugned order is nothing but to review and/or recall order dated 16.03.2007 passed below application Exh.163 and considering the provisions of Cr.P.C., such powers to recall or review the order are not vested with the learned Magistrate. At this stage judgment of the Hon'ble Supreme Court in the case of Adalat Prasad v/s. Rooplal Jindal & Ors. reported in (2004) 7 SCC 338 is required to be referred to. Thus, impugned order passed below Exh.170 is without jurisdiction.

10. Even otherwise on merits also there are no hard and fast rules that those witnesses named in the charge-sheet are to be examined first by the prosecution and only thereafter additional witnesses can be examined. Examination of the witnesses is

prerogative of the prosecution and looking to the facts and circumstances of the case, it is within discretion of the concerned learned public prosecutor to decide to whom he wants to examine first during the course of trial. The prosecution may examine prime and important witnesses at any point of time and therefore, observations of the learned Additional Sessions Judge that those witnesses named in the charge-sheet are to be examined first and thereafter only justification for examining additional witnesses can be considered, is unknown to Cr.P.C. It is required to be noted that as stated above, as such application of the prosecution to examine additional witnesses named in para – 5 in the application Exh.163 was already allowed by the learned trial Court even considering no objection submitted by the accused persons. Under the circumstances, there was no necessity for the learned Additional Sessions Judge to observe that prayer of the prosecution to examine additional witnesses is required to be considered at final stage, as the said prayer was already granted earlier and even summons were also ordered to be issued upon the witnesses. Now considering the

aforesaid facts and circumstances and even accepting the proposition of the law laid down by the Hon'ble Supreme Court in the aforesaid two decisions relied upon by the accused persons and when it is found that the impugned order passed by the learned Additional Sessions Judge is without jurisdiction in as much as the impugned order would amount to review and/or recall earlier order dated 16.03.2007 passed below Exh.163 which powers the learned Magistrate and/or trial court is not possessing, impugned order passed below Exh.170 requires to be quashed and set aside. Even otherwise, learned Advocate appearing on behalf of the accused persons is unable to show any prejudice will be caused to the defence if those additional witnesses named in para -5 of the application Exh.163 are examined first before witnesses named in the charge-sheet are examined. As such accused persons have also submitted in the application Exh.170 that they have no objection for production of documents as per para (a) and (b) of Para - 5 of the application Exh.163.

11. For the reasons stated above, the petition succeeds. Impugned order dated 02.06.2007 passed by

the learned Additional Sessions Judge, Fast Track Court No.3, Ahmedabad (Rural) in Sessions Case No.20 of 2005 below Exh.170 is hereby quashed and set aside. Rule is made absolute to the aforesaid extent.

In view of allowing Special Criminal Application No.1432 of 2007 and quashing the impugned order dated 02.06.2007 below Exh.170, no order in Criminal Misc. Application No.7659 of 2007 which is filed by the original complainant challenging the very order. Criminal Misc. Application No.7659 of 2007 is disposed of.

[M.R.Shah, J.]

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